

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs May 15, 2007

NARRELL C. PIERCE v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2004-A-568 J. Randall Wyatt, Jr., Judge

No. M2006-01308-CCA-R3-PC - Filed August 7, 2007

The petitioner, Narrell C. Pierce, appeals the Davidson County Criminal Court's denial of post-conviction relief. His 2005 petition for post-conviction relief challenged his guilty-pleaded 2004 convictions of aggravated robbery (four counts) and attempt to commit aggravated robbery (three counts) on the grounds, *inter alia*, (1) that he received ineffective assistance of trial counsel and (2) that his guilty pleas were involuntary. Following an evidentiary hearing, the post-conviction court denied relief and dismissed the petition. Because the record supports this action, we affirm the post-conviction court's order.

Tenn. R. App. P. 3; Judgment of the Criminal Court is Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and D. KELLY THOMAS, JR., JJ., joined.

Paula Ogle Blair, Nashville, Tennessee, for the Appellant, Narrell C. Pierce.

Robert E. Cooper, Jr., Attorney General & Reporter; Rachel West Harmon, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Jeff Burks, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

The charges that resulted in the convictions now being challenged began as petitions in juvenile court, and the juvenile court transferred the cases to criminal court. *See* T.C.A. § 37-1-134(a) (2005). In criminal court, the petitioner pleaded guilty to the seven offenses and received an effective sentence of 12 years to be served as a Range I offender with a release eligibility of 30 percent.

In the post-conviction evidentiary hearing, the petitioner testified that he was 18 years old; he was 17 when he pleaded guilty, and he was 15 when he committed the conviction offenses.

He testified that he went to school until he was in the eleventh grade, but he attended special education and alternative classes. He acknowledged that he could read without difficulty.

The petitioner testified that his trial counsel did not challenge the photographic array shown to the victims and neither mounted a defense at, nor appealed from, his juvenile court transfer hearing. The petitioner testified that counsel visited him three times in jail but did not fully explain the proceedings to him. He denied that he was aware that he was pleading guilty to all seven charges, although he understood he would receive an effective 12-year sentence with a release eligibility of 30 percent. He testified that he had wanted to go to trial, but his mother persuaded him to take the plea.

On cross-examination, the petitioner admitted that he understood and waived a litany of rights during his plea submission hearing. He also acknowledged that, during that hearing, he indicated satisfaction with counsel, and he knew that, if he went to trial, he could receive a sentence longer than 12 years.

The petitioner's mother, Michelle Pierce, testified that the petitioner had a "disability" that led to her attending multi-disciplinary team meetings and the utilization of an individual education plan (IEP) for him at his school. She stated that the disability was "more for behavioral and emotional problems" than for academic deficiencies. Copies of the IEP were introduced into evidence and showed that the petitioner had significant anger management and impulse control problems. At an earlier age, he had been diagnosed as "emotionally disturbed." The petitioner was capable, however, of functioning intellectually within normal limits.

Ms. Pierce testified that, prior to trial, the investigating detectives took advantage of the petitioner, coaxing a statement from him by promising that his cases would remain in juvenile court. She stated that the petitioner's trial counsel, who represented him also in juvenile court, moved the criminal court to allow him to withdraw from the case on the basis that he was not "familiar" with criminal court. The criminal court denied the motion, and according to Ms. Pierce, the petitioner was then "pushed" into pleading guilty. She testified that the petitioner wanted "to go another way" but that his attorney scared him. She claimed that the petitioner's agreeable manner during the plea colloquy was the result of "coach[ing]." Ms. Pierce did admit that the petitioner was intelligent enough to understand what was happening in the criminal court.

Trial counsel testified in the evidentiary hearing that he began representing the petitioner *pro bono* in juvenile court and continued representing him throughout the criminal court guilty pleas. He testified that the victims of the charged offenses testified in the juvenile court transfer hearing, that he cross-examined them, and that he did not want the petitioner to testify at the hearing. He admitted that he did not obtain the petitioner's educational or psychological records and did not use them in the transfer hearing. He did not appeal the juvenile court's order of transfer.

Counsel testified that he had no doubt that the petitioner's pretrial statement was voluntary and that the photographic array used by the police was proper, and he saw no bases for

moving the court to suppress evidence that might result from the statement and the array. Counsel testified that he interviewed the detective and watched the videotape of the petitioner's pretrial statement with the assistant district attorney general, from whom he also received discovery materials. Counsel testified that he believed the State had a strong case. He talked with the assistant district attorney general on several occasions, attempting to bargain for an effective sentence lower than the 20 years the State initially proposed.

Counsel testified that the petitioner understood the proceedings, the risks of trial, and the terms of the plea agreement. Counsel stated that the petitioner's mother counseled with the petitioner throughout the proceedings, and counsel believed that he himself stayed in communication with the petitioner.

The post-conviction court entered written findings in an order denying relief. The court reviewed the post-conviction testimony in detail. It found that trial counsel (1) adequately investigated and researched the possibility of a motion to suppress the defendant's pretrial statement and reasonably concluded that such a motion would be without merit; (2) reasonably concluded that the photographic array used by the police evinced no irregularities that would support a motion to suppress witnesses' identifications; (3) reasonably concluded that the juvenile court's transfer of the defendant's cases to criminal court was not assailable on appeal; and (4) adequately advised and counseled the petitioner as to the prosecution's evidence, the possible sentencing ranges, the State's plea offers, the risks of going to trial, and the possibility of consecutive sentencing. The post-conviction court then determined that the petitioner voluntarily and knowingly entered his guilty pleas. From these holdings and the consequent dismissal of his post-conviction petition, the petitioner appeals.

It is well settled that the burden is on the petitioner, in a post-conviction proceeding, to prove his allegations by clear and convincing evidence. T.C.A. § 40-30-110(f)(2003). On appeal, the post-conviction court's findings of fact are given the weight of a jury verdict and are conclusive unless the evidence preponderates against them. *Clenny v. State*, 576 S.W.2d 12, 14 (Tenn. Crim. App. 1978).

I. Ineffective Assistance of Counsel

When a post-conviction petitioner seeks relief on the basis of ineffective assistance of counsel, he must establish that the service rendered or the advice given was below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). Also, he must show that the deficiencies "actually had an adverse effect on the defense." *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067 (1984). There must be a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 694, 104 S. Ct. at 2068; *see Best v. State*, 708 S.W.2d 421, 422 (Tenn. Crim. App. 1985). Should the petitioner fail to establish either factor, he is entitled to no relief.

This two-part standard of measuring ineffective assistance of counsel also applies to claims arising out of a guilty plea. *See Hill v. Lockhart*, 474 U.S. 52, 58, 106 S. Ct. 366, 370 (1985). The prejudice component is modified such that the defendant “must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Id.* at 59, 106 S. Ct. at 370; *see also Hicks v. State*, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998). Even so, as the Supreme Court explained in *Hill v. Lockhart*,

In many guilty plea cases, the “prejudice” inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error “prejudiced” the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the “prejudice” inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial.

Hill, 474 U.S. at 59, 106 S. Ct. at 370-71.

The scrutiny of counsel’s performance must be “highly deferential,” and the reviewing court must refrain from concluding that a particular act or omission of counsel was unreasonable merely because the strategy employed was unsuccessful. *See Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. “A fair assessment,” the United States Supreme Court has said, entails making every effort to “eliminate the distorting effects of hindsight” and evaluating the “conduct from counsel’s perspective at the time.” *Id.*, 104 S. Ct. at 2065. The court promulgated a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.*, 104 S. Ct. at 2065. The court added:

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Id. at 690-91, 104 S. Ct. at 2066.

The petitioner claims on appeal that his trial counsel was ineffective because he failed to (1) file a motion to suppress the petitioner's pretrial statement, (2) interview witnesses, (3) discuss discovery materials with the petitioner, (4) present evidence of the petitioner's psychological problems to the juvenile court, and (5) appeal the transfer ruling.

We hold, however, that the petitioner failed to establish by clear and convincing evidence in the evidentiary hearing that counsel was ineffective in any of these particulars. Upon our review of the record, we can find no bases for saying that counsel was deficient in any of these cited areas, with the exception of counsel's failure to address the petitioner's psychological history in the juvenile court transfer hearing. *See State v. Howell*, 185 S.W.3d 319, 328 (Tenn. 2006) (holding that juvenile court transfer hearing counsel performed deficiently in failing to utilize available psychological evidence in transfer hearing, given that counsel's strategy was to prevent transfer of the juvenile). We note that "[t]here is no civil or interlocutory appeal from a juvenile court's [transfer] disposition. . . ." T.C.A. § 37-1-159(d) (2005); *Mozella Newson*, No. W2005-00477-CCA-R3-PC, slip op. at 5 (Tenn. Crim. App., Jackson, July 11, 2006). At any rate, the record illustrates no prejudice from counsel's handling of the transfer hearing, *see, e.g., Howell*, 185 S.W.3d at 329-30, or from any of the other alleged omissions of counsel leading up to the acceptance of the petitioner's guilty pleas.

II. Involuntary or Unknowing Guilty Pleas

Due process demands that a guilty plea be entered voluntarily, knowingly, and understandingly. *See Boykin v. Alabama*, 395 U.S. 238, 242-44, 89 S. Ct. 1709, 1711-13 (1969). A plea is involuntary if the accused is incompetent or only "if it is the product of 'ignorance, incomprehension, coercion, terror, inducements, [or] subtle or blatant threats.'" *Blankenship v. State*, 858 S.W.2d 897, 904 (Tenn. 1993) (quoting *Boykin*, 395 U.S. at 242-43, 89 S. Ct. at 1712). A defendant's testimony at a plea hearing that his or her plea is voluntary is a "formidable barrier in any subsequent collateral proceedings" because "[s]olemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S. Ct. 1621, 1629 (1977).

The petitioner's testimony supports a conclusion that he fully understood the terms of his plea agreement, the risks entailed in going to trial, and the nature and effect of his waiver of rights and pleas of guilty.

III. Conclusion

Because the record supports the post-conviction court's ruling, we affirm the denial of post-conviction relief.

JAMES CURWOOD WITT, JR., JUDGE